IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983 TERM

FRANK E. FERREIRA, and MILGEN INVESTMENT COMPANY Petitioners, v. L&M PROFESSIONAL CONSULTANTS, INC., a corporation; and CITY OF CHULA VISTA, Respondents.	CASE NO. 83-1450

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER, 1983 TERM

FRANK E. FERREIRA, and MILGEN INVESTMENT COMPANY Petitioners, v. L&M PROFESSIONAL CONSULTANTS, INC., a corporation; and CITY OF CHULA VISTA, Respondents.	CASE NO. 83-1458

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California

November 23, 1983

I have this day filed Order _____

HEARING DENIED

In re: 4 Civ. No. 24836

L&M PROFESSIONAL CONSULTANTS, INC.

vs.

FRANK E. FERREIRA

Respectfully,

Clerk

27074-8778-824M*OSP

APPENDIX A

[146 Cal.App.3d 1038]

[Civ.No. 24836. Fourth Dist., Div. One.
Sept. 13, 1983.]

L&M PROFESSIONAL CONSULTANTS, INC.,
Plaintiff and Respondent, v.
FRANK E. FERREIRA et al.,
Defendants and Appellants.

FRANK E. FERREIRA et al.,
Plaintiffs and Appellants, v.
CITY OF CHULA VISTA et al.,
Defendants and Respondents.

SUMMARY

After a hearing, a city council adopted a resolution consenting to a land developer's private condemnation of an appurtenant easement for sewer and storm drainage across property owned by a partnership. The developer then filed an eminent domain action to acquire the easement under the authority of Civ. Code, § 1001, and Code Civ. Proc., § 1245.325. The trial court rejected the partnership's petition for a writ of mandate to

invalidate the resolution of consent and to declare Civ. Code § 1001, unconstitutional. In the eminent domain action, the trial court entered a judgment of condemnation for the easement, with the developer to pay compensation plus legal interest to the partnership (Superior Court of San Diego County, Nos. 441118, 444681, James L. Focht, Judge.)

The court of appeal affirmed the judgments, holding Civ. Code § 1001, and Code Civ. Proc., § 1245.325, which provide for private condemnation authority, were neither facially unconstitutional nor unconstitutional as applied to the partnership. The court held the statutes are not unconstitutionally vague in that they do not contain a specific standard for determining when a "great necessity" exists; great necessity does not exist when a condemnation alternative is more preferable than a reasonably acceptable noncondemnation alternative, but only when a

condemnation alternative is the sole reasonably acceptable means for providing utility service for a piece of property. The court also held the statutes do not unconstitutionally permit the condemnation of private property for private uses. The statutes constitute a legislative declaration that the private condemnation of a utility easement is for a public use pursuant to Code Civ. Proc., § 1240.010; thus it was unnecessary to include in the statutes the requirements which such takings satisfy by definition. The court further held the hearing procedures adopted by the city council did not violate the due process rights of the partnership, inasmuch as the partners presented a comprehensive statement of their position, contesting both the necessity and appropriate location for the condemnation, and the fact that they later had another idea for a different location did not mean they had a due process right to another hearing. The

court held substantial evidence supported the findings of the city council in its resolution and that the resolution was therefore valid. It also held the owners received a sufficient return on their award. In addition to legal interest, they received value from remaining in possession until after the develo er deposited the balance due them under judgment of condemnation. (Opinion by Wiener, J., with Cologne, Acting P.J., and Lewis, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

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*Assigned by the Chairperson of the Judicial Council.

(1) Eminent Domain § 8 - Uses and Purposes Authorized - Legislative Determination - Private Condemnation to Acquire Utility Service. -- In restoring private condemnation authority to owners of private property for the limited purpose of acquiring appurtenant easements to provide utility service to their property (Civ. Code, § 1001, Code Civ. Proc., 1245.325) the Legislature intended that authority to serve the function of opening what would otherwise be landlocked property to enable its most beneficial use, since as a practical matter land to which utility service cannot be extended cannot be developed.

(2) Eminent Domain § 11 - Property Subject to Condemnation - Necessity for, and Extent of, Condemnation - Private Condemnation to Acquire Utility Service. -- In subjecting private

condemnation authority to several limitations, including that a "great necessity" must exist for the proposed taking (Civ. Code, § 1001, subd. (c)(1), Code Civ. Proc., § 1245.325, subd. (b)(1)), which is a stricter standard than the usual "public interest and necessity" requirement applicable generally to eminent domain proceedings, the purpose of the Legislature was to prevent abuses which had been possible under the former eminent domain law.

(3a, 3b) Eminent Domain § 11 - Property Subject to Condemnation - Necessity for, and Extent of, Condemnation - Private Condemnation to Acquire Public Utility Service - Constitutionality of Statutes. -- Civ. Code, § 1001, subd. (c)(1), and Code Civ. Proc., § 1245.325, subd. (b)(1), which provide private condemnation authority

to a property owner to acquire an appurtenant easement to provide utility service to the owner's property, if there is a great necessity for the taking, are not unconstitutionally vague in that they do not contain a specific standard for determining when a "great necessity" exists. Great necessity does not exist when a condemnation alternative is more preferable than a reasonably acceptable non-condemnation alternative, since under such circumstances a piece of property is not "otherwise landlocked"; it only exists when a condemnation alternative is the sole reasonably acceptable means for providing utility service to a piece of property.

(4) Statutes § 37 - Construction - Giving Effect to Statute - Sustaining Validity - Consideration of Legislative Intent. -- Enactments should be

interpreted when possible to uphold their validity, and courts should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. In providing such content, the court must look to legislative intent so that the purpose of the statute will be achieved.

(5) Eminent Domain § 77 - Condemnation Proceedings - Trial - Evidence - Purpose or Necessity of Taking - Private Condemnation to Acquire Public Utility Service - Determination of Necessity. -- In a hearing on a proposal by a land developer for private condemnation of an appurtenant easement for sewer and storm drainage across property owned by a partnership, the city council correctly determined a great necessity existed for the condemnation (Civ. Code, § 1001, subd. (c)(1), Code Civ. Proc., §

1245.325, subd. (b)(1), where the partnership's no-condemnation proposal would have required importing 80,000 cubic yards of fill costing more than $500,000 as compared with a total estimated project development cost of $6,800,000, and where the 18 proposed homes would have had to be clustered rather than spread out on large lots, in violation of the city planners' development and environmental guidelines. Under the circumstances, the no-condemnation proposal was not a reasonably acceptable means of providing utility service to the development, and without the condemnation of the easement, the property could not have been developed.

[See Cal. Jur.3d, Eminent Domain, §§ 12, 13, 56, 57; Am.Jur.2d, Eminent Domain, §§ 20, 111.]

(6) Eminent Domain § 7 - Uses and Purposes Authorized - What Constitutes Public Use or Purpose - Private Condemnation to Provide Utility Service to Owners' Property - Constitutionality of Statutes. -- Civ. Code, 1001, and Code Civ. Proc., § 1245.325, which provide for the private condemnation of property to acquire an appurtenant easement to provide utility service to the owner's property, are not facially unconstitutional for allegedly allowing the condemnation of private property for private uses in violation of constitutional requirements that private property be condemned only for public uses (U.S. Const., Amends. V, XIV, §1; Cal. Const., art I, § 19). The statutes must be construed in context and harmonized with companion

provisions of an overall statutory system. Civ. Code., § 1001 and Code Civ. Proc., § 1245.325, constitute a legislative declaration that the private condemnation of utility easements is for a public use (Code Civ. Proc., § 1240.010); thus it was unnecessary to include in the statutes requirements which such takings satisfy by definition. Furthermore, neither statute abrogates the fundamental public use limitation applicable to all takings by public or quasi-public entities (Code Civ. Proc., §§ 1240.010, 1245.380, 1245.340).

(7) Eminent Domain § 7 - Uses and Purposes Authorized - What Constitutes Public Use or Purpose - Private Condemnation to Provide Utility Service to Owner's Property - Constitutionality of Statutes. -- Civ. Code, § 1001, and

Code Civ. Proc., § 1245.325, which provide for the private condemnation of property to acquire an appurtenant easement to provide utility service to the owner's property, are not unconstitutional as applied to the condemnation of a partnership's property by a land developer for sewer and storm drainage in that the developer would profit from its development of an exclusive residential neighborhood. It is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for public use. Condemnation of private property to provide sewer service also is a taking for public use. Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose; therefore,

the developer's condemnation was not for a private rather than a public use.

(8) Administrative Law § 38 - Administrative Actions - Adjudication - Character of Proceedings - Consent to Private Condemnation of Property. --The act of a city council in consenting to a land developer's private condemnation of property to acquire an appurtenant easement to provide utility service to the developer's property was arguably the exercise of its power of eminent domain, which is an inherent attribute of sovereignty. From this point of view, the act was therefore legislative. However, given the particularity of the council's decision and the small size and number of parcels involved and relatively few property owners affected, the act may have been adjudicative, and in fact

the council treated it as such, in which case procedural due process requirements apply and judicial review of the decision to consent is administrative rather than traditional mandamus.

(9) Constitutional Law § 103 - Due Process - Nature - Deprivation of Property Interest. -- Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest, and this applies to temporary as well as final deprivations of property.

(10) Eminent Domain § 62 - Condemnation Proceedings - Consent to Private Condemnation of Property - Hearing - Procedural Due Process. -- The procedures adopted by a city council in a hearing to determine whether to

consent to a proposed private condemnation of property to acquire an appurtenant easement to provide utility service to the owner's property did not violate the due process rights of the owners of the condemned property of their statutory rights to a hearing (Code Civ. Proc., 1245.350, subd. (a)). Although the council's act did not deprive the property owners, even temporarily, of any interest in their property, procedural due process was required for the council's decision to consent, inasmuch as it treated its decision as an adjudicative act. At the hearing, of which the property owners received both adequate notice and a three-week postponement, the property owners presented a comprehensive statement of their position, contesting both the necessity and appropriate location for the condemnation. The fact that they later had another

idea for a different location did not mean they had a due process right to another hearing. If that were the law, decisions could be endlessly delayed by the inadvertent omissions of deliberate strategies of prospective condemnees. Due process cannot become a vehicle for bringing the processes of government to a halt.

(11) Administrative Law § 113 - Judicial Review - Scope and Extent - Independent Judgment and Substantial Evidence Rules. -- In an inquiry into the validity of an administrative decision, judicial review under the independent judgment rule is invoked when an administrative decision substantially affects fundamental vested rights, while review under the substantial evidence test is applied to other adjudicative acts (Code Civ. Proc., § 1094.5).

(12) Administrative Law § 131 - Judicial Review - Scope and Extent - Evidence - Substantial Evidence Rule - Consent to Private Condemnation of Property. -- The interests of two property owners in their property represented fundamental vested rights. However, the action of a city council in consenting to the private condemnation of the property to acquire an appurtenant easement to provide utility service to another owner's property did not substantially affect those rights, inasmuch as the consent did not deprive the owners of the subsequently condemned property of any interest in their property. Rather, any deprivation resulted from the entry of a judgment of condemnation by the superior court. Therefore, the substantial evidence test applied to the judicial review of the council's decision to consent (Code Civ. Proc., 1094.5).

(13) Administrative Law § 131 - Judicial Review - Scope and Extent - Evidence - Substantial Evidence Rule - Resolution of Reasonable Doubts. -- In applying the substantial evidence test in review of an administrative decision, a reviewing court must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision, and so long as they are sufficient to apprise the reviewing court of the basis for the agency's decision, the necessary findings may be formal or informal and may be contained in the agency's order or decision.

(14) Eminent Domain § 79 - Condemnation Proceedings - Trial - Evidence - Sufficiency - Administrative Hearing - Private Condemnation to Acquire Easement to Provide Utility Service - Evidence Supporting Findings. -- The findings of a city council in its resolution consenting to a land developer's private condemnation of property to acquire an appurtenant easement to provide utility service to the developer's property were supported by substantial evidence, and supported the decision to consent, where the pertinent evidence supporting the findings appeared in the resolution and where the resolution described the public uses to be served by the easement, identified the statutory authority for the condemnation, described precisely the location and extent of the easement to be taken, justified the location selection, and presented

the council's assessment of the relative hardships the parties would bear if the taking was either disapproved or permitted.

(15) Eminent Domain § 126 - Condemnation Proceedings - Payment - Sufficiency; Enforcement - Sufficiency of Interest Rate. -- On appeal of a judgment permitting a land developer's private condemnation of property to acquire an appurtenant easement to provide utility services to the developer's property, the contention of the owners of the affected property that the trial court violated their constitutional rights to just compensation (U.S. Const., 5th and 14th Amends.) by applying the legal rather than the market rate of interest to their award did not need to be resolved under the particular circumstances of the case. The owners were essentially arguing

they did receive an adequate return on their award, rather than challenging the adequacy of the award itself. Interest may be awarded either at the legal or market rate, and as a practical matter the owner's return on the award was sufficient, where in addition to legal interest, they received value from remaining in possession until after the developer deposited the balance due them under the judgment of condemnation.

COUNSEL

Jenkins & Perry, Michael B. Poynor and Karen J. Headly for Defendants and Appellants and Plaintiffs and Appellants.

Gray, Cary, Ames & Frye, Richard A. Paul, Thomas J. Harron and George D. Lindberg for Plaintiff and Respondent and for Defendants and Respondents.

OPINION

WIENER, J. - In September 1979 the Chula Vista City Council (Council) adopted a resolution consenting to the private condemnation by L&M Professional Consultants, Inc. (L&M) of an appurtenant easement for sewer and storm drainage across property owned by Frank E. Ferreira (Ferreira) and Milgen Investment Company (Milgen). L&M then filed an eminent domain action to acquire the easement under the authority of Civil Code section 1001 and Code of Civil Procedure section 1245.325. [1] Ferreira and Milgen unsuccessfully petitioned the superior court to invalidate the Council's resolution of consent and to declare Civil Code section 1001 unconstitutional. The court also found in favor of

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[1]All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

L&M in the eminent domain action and entered a judgment of condemnation for the easement. Ferreira and Milgen appeal both judgments.

Among their many arguments, Ferreira and Milgen contend Civil Code section 1001 and section 1245.325 are unconstitutional both on their face and as applied. They also argue the Council denied them due process in the hearings it conducted before consenting to L&M's proposed condemnation, and again challenge the validity of the Council's resolution of consent. Finally, Ferreira and Milgen argue the lower court erroneously applied the legal rather than market rate of interest to their condemnation award. As we shall explain, we reject these arguments and affirm the judgments.

I

FACTUAL AND PROCEDURAL BACKGROUND

We narrate the facts in some detail

because of the substantial evidence review required by Ferreira's and Milgen's challenge to the validity of the Council's resolution of consent. (See part III C, post.)

In 1978 L&M purchased 10.9 acres of essentially undeveloped hillside property in Chula Vista commonly known as Villa San Miguel for $1,115,000. The property sloped downward in a northerly and northeasterly direction. Ferreira owns or controls all the property on Villa San Miguel's northern and eastern borders. Vehicular access to Villa San Miguel is from the Southwest via Hilltop Drive. Stands of mature palm, pine and eucalyptus trees populate the property in the higher elevations near its southern border.

In late 1978, L&M began to prepare a tentative map for the construction of 18 expensive homes at Villa San Miguel. The Chula Vista city planner set several

guidelines for L&M's project, including the preservation of the property's mature trees and rural character and the avoidance of extensive grading. These guidelines, combined with the property's topography, precluded gravity sewerage and drainage to Hilltop Drive. Consequently, L&M's tentative map proposed locating a sewer easement across Ferreira's property north of Villa San Miguel. Drainage was to be onsite.

In early 1979 the Chula Vista Planning Commission and the Council held separate public hearings on L&M's tentative map. Ferreira and his attorney each spoke at both hearings in opposition to L&M's project. They criticized the lack of offsite drainage for the project and described a history of flooding and drainage problems on Ferreira properties resulting from rain water flowing north off of Villa San Miguel. They also claimed L&M's proposed sewer easement would interfere with existing underground utilities. The Council

approved L&M's tentative map after L&M agreed to provide offsite drainage and to relocate the sewer easement across a vacant lot northeast of Villa San Miguel. The lot is 0.89 acres in size and had a 1978-1979 assessed value of $10,600. Ferreira and Milgen owned the lot through a partnership in which Ferreira acts as the managing partner.

Following the Council's approval of the tentative map, L&M and Ferreira discussed locations for a sewer and storm drainage easement across Ferreira's and Milgen's property. L&M proposed three locations and Ferreira proposed one. After negotiations proved fruitless, L&M sought Council consent to its condemnation of an easement across Ferreria's and Milgen's property. The Council noticed a hearing on L&M's proposed condemnation and then postponed the hearing for three weeks at Ferreira's request.

The postponed hearing convened on August 14, 1979. The hearing transcript is lengthy and shows Ferreira and his attorney each participated extensively, as did Ferreira's engineer. The Council heard testimony and received maps and diagrams describing three alternatives, a "red easement" location proposed by L&M, a "blue easement #1" location proposed by Ferreira and a "no-condemnation" proposal by Ferreira and for development of Villa San Miguel with gravity sewerage and drainage to Hilltop Drive. Ferreira also presented his plans to develop a 27-unit apartment complex on his and Milgen's property, and described the initial work (site planning and retaining wall) he had completed on that project. After the parties completed their comments, the Council closed the public hearing and deferred taking action for two weeks to allow its staff additional time to study Ferreira's development plans and blue easement #1 proposal.

On August 28, 1979, the Council reconvened. Ferreira and his attorney were present. Council staff presented an evaluation of the three alternatives discussed on August 14. The staff also commented on a "blue easement #2" location Ferreira proposed to them during the two-week continuance. After the staff's comments, and without allowing further public testimony, the Council adopted the staff's recommendation to approve L&M's condemnation of a 10-foot wide sewer and storm drainage easement at Ferreira's blue easement #1 location. One week later the Council unanimously adopted a corresponding resolution of consent. (§§ 1245.330, 1245.360.)

The Council rejected Ferreira's no-condemnation proposal because it would have required importing 80,000 cubic yards of fill costing more than $500,000 and clustering the 18 homes near Hilltop Drive rather than spreading them out on large

lots. The Council also rejected Ferreira's blue easement #2 proposal because it would have violated a city ordinance requiring open space above easements, thus creating a serious service and maintenance problem for the city. As between the red easement and blue easement #1 proposals, the Council selected the latter alternative after Ferreira's attorney testified on August 14 that it would "create the least damage" to development plans for Ferreria's and Milgen's property and would "not in any way interfere with the highest and best use of that property." L&M estimated its condemnation and utility installation costs at the blue easement #1 location would be $106,000, approximately double its estimated costs at the red easement location.

In September 1979 L&M filed an action to condemn the easement approved by the Council and deposited the probable condemnation compensation for the easement. (§ 1255.010.) In October L&M obtained an

order for possession of the easement as of mid-November. (§ 1255.410.) Ferreira and Milgen did not withdraw the deposited compensation (§ 1255.210) or seek a stay of the order for possession. (§§ 1255.420, 1255.430.) Instead, they petitioned the superior court in December for a writ of mandate (§ 1094.5) ordering the Council to rescind its resolution of consent and declaring Civil Code section 1001 unconstitutional. In May 1981 the lower court entered a judgment on an order denying Ferreira's and Milgen's petition. Five months later the court entered a judgment for L&M condemning the easement approved by the Council. That judgment required L&M to pay Ferreira and Milgen $8,400 compensation for the easement plus 7 percent legal interest on that amount from mid-November 1979. (§ 1268.310, subd. (c).) One month after the judgment of condemnation was entered L&M deposited the balance due Ferreira and Milgen under the judgment. (§

1268.110.) Sometime after making that deposit L&M took possession of the condemned easement. This appeal ensued.

II

CONSTITUTIONALITY OF PRIVATE CONDEMNATION STATUTES

A

Legislative History and Intent

(1) In 1975 the Legislature enacted a thoroughly revised and recodified eminent domain law. (§ 1230.010 et seq.) Before that enactment the form of Civil Code section 1001 authorized private persons to condemn private property for any public use listed in former section 1238. (Stats. 197, ch. 662, § 1, pp. 1285-1288; Recommendation Proposing the Eminent Domain Law (Dec. 1974) 12 Cal. Law Revision Com. Rep. (1974) p. 1634.) The 1975 eminent domain law abolished all private condemna-

tion authority, except that exercised by privately owned public utilities and five types of quasi-public entities. (Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep. (1976) p. 1475.) The Legislature considered the former law constitutionally suspect because it seemed to authorize private condemnation for predominantly private purposes. (Sen. Legis. Com. com., 1976 Repeal of § 1238, 19 West's Ann. Code Civ. Proc., pp. 452, 463, 465-466.) With the advent of the new law private persons seeking the extension of utility services to their property could request the appropriate public entity undertake the necessary condemnation on their behalf. (Id., at pp. 452, 456, 468.) This approach, however, proved unworkable due to the reluctance or unwillingness of many public entities to condemn utility easements on behalf of private persons.

(Recommendations Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., supra, at p. 1476.) Consequently, the Legislature in 1976 restored private condemnation authority to powers of private property for the limited purpose of acquiring appurtenant easements to provide utility service to their property. This authority, codified in Civil Code section 1001 and section 1245.325, is designed to serve ". . . the function of opening what would otherwise be landlocked property to enable its most beneficial use. As a practical matter, land to which utility service cannot be extended . . . cannot be developed." (Id., at pp. 1475-1476, fn. omitted.) Toward that end, Civil Code section 1001 provides:

"(a) As used in this section, 'utility service' means water, gas, electric, drainage, sewer or telephone service.

"(b) Any owner of real property may acquire by eminent domain an appurtenant easement to provide utility service to the owners' property.

"(c) In lieu of the requirements of Section 1240.030 of the Code of Civil Procedure, the power of eminent domain may be exercised to acquire an appurtenant easement under this section only if all of the following are established:

"(1) There is a great necessity for the taking.

"(2) The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property.

"(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property." In like manner, section 1245.325 provides:

"Where an owner of real property seeks to acquire an appurtenant easement by eminent domain pursuant to Section 1001 of the Civil Code:

"(a) The person seeking to exercise the power of eminent domain shall be deemed to be a 'quasi-public entity' for the purposes for this article.

"(b) In lieu of the requirements of subdivision (c) of Section 1245.340, the resolution required by this article shall contain a declaration that the legislative body has found and determined each of the following:

"(1) There is a great necessity for the taking.

"(2) The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property.

"(3) The hardship to the owner of the appurtenant property, if the taking is not

permitted, clearly outweighs any hardship to the owner of the burdened property."

B

Facial Constitutionality -- Great Necessity

(2) To prevent abuses which had been possible under the former eminent domain law, the Legislature made the new private condemnation authority subject to several limitations. (Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., supra, at pp. 1476-1477.) One of those limitations is that a "great necessity" must exist for the proposed taking. (Civ. Code § 1001, subd. (c)(1); § 1245.325, subd. (b)(1). This limitation replaces the usual "public interest and necessity" requirement (§§ 1240.030, subd. (a), 1245.230 subd. (c)(1), 1245.340 subd. (c)(1) with a stricter standard applicable only to the private condemnation of utility easements. (Civ. Code., § 1001, subd. (c);

§ 1245.325, subd. (b); see Law. Rev. Com. coms., 1976 Addition, 7 West's Ann. Civ. Code, § 1001, p. 259 and 19 West's Ann. Code Civ. Proc., § 1245.325, p. 606.)

(3a) Ferreira and Milgen contend Civil Code section 1001, subdivision (c)(1) and section 1245.325, subdivision (b)(1) are unconstitutionally vague because they do not contain a specific standard for determining when a "great necessity" exists for the private condemnation of a utility easement.[2] (4) We consider this argument in light of the principles that ". . . enactments should be interpreted when possible to uphold their validity [citation], and . . . courts should construe enactments to give specific content to terms that

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[2]Ferreira and Milgen also spend one page of their reply brief arguing the other requirements of Civil Code section 1001, subdivision (c) and section 1245.325, subdivision (b) are unconstitutionally vague. We do not address these contentions because they do not merit discussion.

might otherwise be unconstitutionally vague. [Citations.]" (Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 599 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038].) We must, of course, look to legislative intent in providing such content so that the purposes of the statutes will be achieved. (People v. Shirokow (1980) 26 Cal.3d 301, 306-307 [162 Cal.Rptr. 30, 605 P.2d 859].)

(3b) As noted above, the Legislature enacted Civil Code section 1001 and section 1245.325 to enable the development of private property to its most beneficial use. Whether and how utility service can be provided to a piece of property typically depend on a number of factors, including applicable land use regulations, environmental impacts of development, anticipated service requirements, physical characteristics of the property and various cost/benefit considerations. Usually these requirements can be satisfied and utility

service provided without resort to private condemnation. Occasionally, however, the necessary conditions for providing service without condemnation cannot all be met. (5) Here, for example, Ferreira's no-condemnation proposal would have required importing 80,000 cubic yards of fill costing more than $500,000 and clustering the 18 homes near Hilltop Drive rather than spreading them out on large lots. This approach would have violated development and environmental guidelines established by Chula Vista city planners and would have been inordinately expensive in light of total project development costs which, at the time of trial, were expected to reach approximately $6.8 million. Under these circumstances, Ferreira's no-condemnation proposal was not a reasonably acceptable means for providing utility service to Villa San Miguel. Stated another way, a "great necessity" existed for L&M's condemnation of a sewer and storm drainage

easement across Ferreira's and Milgen's property because, without such an easement, Villa San Miguel could not be developed.

As illustrated by this case, determining whether a "great necessity" exists for the private condemnation of a utility easement does not turn on a comparative evaluation of condemnation and noncondemnation alternatives. "Great necessity" does not exist when a condemnation alternative is more preferable than a reasonably acceptable non-condemnation alternative. Under such circumstances a piece of property is not "otherwise" landlocked. (See Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., supra, at pp. 1475- 1476.) "Great necessity" exists only when a condemnation alternative is the sole reasonably acceptable means for providing utility

service to a piece of property.[3] This interpretation is consistent with the rationale of Lingii v. Garovotti (1955) 45 Cal.2d 20 [286 P.2d 15]. a landmark private condemnation case which explained a "somewhat stronger showing" of necessity must be made for the private condemnation of a utility easement. (Id., at p. 27.) Although the Supreme Court held Lingii's general allegation of necessity for his proposed sewer easement was sufficient to survive a demurrer, it observed Lingii upon a trial ". . . might be denied the easement which

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[3]The "great necessity" language in Civil Code section 1001, subdivision (a)(1) governs the acquisition of temporary rather than permanent interests in neighboring lands. These two types of situations are significantly different and thus require different standards for determining when the acquisition of such interests is appropriate. Consequently, the "great necessity" standards contained in Civil Code section 1002, subdivision (a)(1) are not pertinent to our interpretation of Civil Code section 1001, subdivision (c)(1) and section 1245.325, subdivision (b)(1).

he is endeavoring to obtain if [an]other remedy is available to him which would be less injurious to private property. For example, the evidence may show that the proper public authorities have not been asked to enlarge the present facilities in [front of Lingii's property] and make that line adequate to carry off all the sewage from Lingii's property. [Citation.]" (Ibid.) Thus, Lingii would be denied his proposed easement if a reasonably acceptable noncondemnation alternative was available to provide sewer service to his property.[4] Because such an alternative was not

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[4]The court concluded by noting "[t]he proposed route may not be the most direct one [across Garovotti's property] to reach the line in [back of Lingii's property], or possibly another route, although less direct, might be less injurious to all property owners concerned." (Ibid.) These comments address the selection of an easement location once a "great necessity" for taking the easement has been shown. (See Civ. Code, § 1001, subd. (c)(2); § 1245.325, subd. (b)(2).)

available here, the Council correctly determined a "great necessity" existed for L&M's condemnation of a sewer and storm drainage easement across Ferreira's and Milgen's property.

C

Facial Constitutionality -- Public Use

(6) Ferreira and Milgen next point out Civil Code section 1001 and section 1245.325 do not require utility easements be taken only for public uses. They argue these omissions violate the United States and California Constitutions in two ways. First, the omissions violate the constitutions' requirements that private property be condemned only for public uses. (U.C. Const., Amend. V, XIV, § 1; Cal. Const., art. I, § 19; see generally McDonald & Noll, Review of Selected 1976 California Legislation (1977) 8 Pacific L.J. 165, 462-463.) Second, the omissions

create two groups of property owners: those subject to takings by quasi-public entities whose powers of eminent domain are limited to public uses (§ 1425.320), and those subject to takings by quasi-public entities whose condemnation powers are not so limited. (§ 1245.325.) This classification denies the second group of property owners the equal protection of the laws. (U.S. Const., Amend. XIV, § 1; Cal. Const., art. I, § 7, subd. (a).) In considering these arguments we must construe the challenged statutes in context and harmonize them with companion provisions of an overall statutory system. (People v. Shirokow, supra, 26 Cal.3d at p. 307.)

The above arguments wrongly assume public use requirements should have been included in Civil Code section 1001 and section 1245.325. In these statutes the Legislature empowered private property owners to acquire utility easements by eminent domain. These provisions thus

constituted a legislative declaration that the private condemnation of utility easements is for a public use. (§ 1240.010.) It was therefore unnecessary to include requirements which such takings satisfy by definition. Even so, the Legislature did include public use requirements applicable to such takings in other provisions of the new eminent domain law. Civil Code section 1001, subdivision (c) supplants the specific requirements of section 1240.030. However, it does not abrogate the fundamental public use limitation applicable to all takings by public and quasi-public entities. (§§ 1240.010, 1245.380; see Law. Rev. Com. com., 1976 addition, 7 West's Ann. Civ. Code, § 1001, p. 259.) Similarly, section 1245.325, subdivision (b) supplants only the requirements of section 1245.340, subdivision (c). The public use limitation of section 1245.340, subdivision (a) still applies to all takings by quasi-

public entities. (See Law Rev. Com. com., 1976 addition, 19 West's Ann. Code civ. Proc., § 1245.325, p. 606.) Civil Code section 1001 and section 1245.325 are not facially unconstitutional for allowing the condemnation of private property for private uses.

D

Constitutionality as Applied -- Public Use

(7) Ferreira and Milgen further argue Civil Code section 1001 and section 1245.325 are unconstitutional as applied in this case. They argue L&M will profit from its development of an exclusive residential neighborhood, and thus its condemnation of their property is for a private rather than a public use. There is no question, however, that L&M intends to use its easement to provide sewer and storm drainage service to Villa San Miguel. "[I]t is clear that the ordinary taking of private property for

the purpose of constructing storm drainage systems is a taking for public use." (Bauer v. County of Ventura (1955) 45 Cal.2d 276, 284 [289 P.2d 1]; see also Marin v. City of San Rafael (1980) 111 Cal.App.3d 591, 595 [168 Cal.Rptr. 750]; 2A Nichols on Eminent Domain (3d rev. ed. 1981) § 7.5155, p. 7-179.) Condemnation of private property to provide sewer service also is a taking for a public use. (See City of Oakland v. Oakland Raiders (1982) 32 Cal.3d 60, 71-72 [183 Cal.Rptr. 673, 646 P.2d 835]; Lingii v. Garovotti, supra, 45 Cal.2d at pp. 23-26; 2A Nichols on Eminent Domain, supra, § 7.5154.) "Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose. [Citations.] (Redevelopment Agency v. Hayes (1954) 122 Cal.App.2d 777, 804 [266 P.2d 105], cert. den., 348 U.S. 897 [99 L.Ed. 705, 75 S.Ct. 214]; see, e.g.,

County of Los Angeles v. Anthony (1964) 224 Cal.App.2d 103, 106-107 [36 Cal.Rptr. 308], cert. den., 376 U.S. 963 [11 L.Ed.2d 981, 84 S.Ct. 1125], rehg. den., 377 U.S. 940 [12 L.Ed.2d 304, 84 S.Ct. 1333]; City of Carlsbad v. Wight (1963) 221 Cal.App.2d 756, 759-760 [34 Cal.Rptr. 820].) Under these authorities we conclude Civil Code section 1001 and section 1245.325 are not unconstitutional as applied in this case.

III

VALIDITY OF COUNCIL'S CONSENT

A

Nature of Council's Act

(8) The nature of the Council's act in consenting to L&M's condemnation presents an important threshold question. If that act was adjudicative rather than legislative, then procedural due process requirements apply (Horn v. County of

Ventura (1979) 24 Cal.3d 605, 612-613 [156 Cal.Rptr. 718, 596 P.2d 1134] and judicial review of the Council's decision to consent is by administrative (§ 1094.5) rather than traditional (§ 1085) mandamus. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 34-35, fn. 2 [112 Cal.Rptr. 805, 520 P.2d 29].) Arguably, the function the Council performed by its act was, in substance, the exercise of its power of eminent domain. (See § 1245.330.) That power is an inherent attribute of sovereignty (City of Oakland v. Oakland Raiders, supra, 32 Cal.3d at p. 64; 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 529, subd. (a), p. 3828) and its exercise is a legislative act under both federal (Joiner v. City of Dallas (N.D.Tex. 1974) 380 F.Supp. 754, 764-766, 769-771, aff'd., 419 U.S. 1042 [42 L.Ed.2d 637, 95 S.Ct. 614], rehg. den., 419 U.S. 1132 [42 L.Ed.2d 831, 95 S.Ct. 818]; see generally 1 Nichols on Eminent Domain

(3d rev. ed. 1981) § 4.11, pp. 4-138 to 4-153) and California Law (People v. Chevalier (1959) 52 Cal.2d 299, 304 [340 P.2d 598]; Wulzen v. Board of Supervisors (1894) 101 Cal. 15, 21 [35 P. 353]). Thus, under one line of cases, the Council's act was legislative. (Pitts v. Perluss (1962) 58 Cal.2d 824, 834 [377 P.2d 83]; City of Chula Vista v. Superior Court (1982) 133 Cal.App.3d 472, 486 [183 Cal. Rptr. 909]; Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal.App.2d 271, 280 [63 Cal. Rptr. 889].) Given, however, the particularity of the Council's decision and the small size and number of parcels involved and relatively few property owners affected, its act may have been adjudicative. (Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 168 [188 Cal. Rptr. 104, 655 P.2d 306]; Horn v. County of Ventura, supra, 24 Cal.3d at pp. 612-614; but see Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal.3d

511, 514, 516-519, 522-523 [169 Cal.Rptr. 904, 620 P.2d 565].) Faced with this uncertainty, the Council took the prudent course by treating its act as adjudicative. (See Mountain Defense League v. Board of Supervisors (1977) 65 Cal.App.3d 723, 729 [135 Cal.Rptr 588].) Because we conclude the Council's decision to consent withstands scrutiny under the stricter standards applicable to adjudicative acts, we do not resolve the threshold classification issue.

B

Due Process

(9) "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. [Citations.]" (Horn v. County of Ventura, supra, 24 Cal.3d at p. 612; citing California and federal cases, italics

added.) Such principles apply to temporary as well as final deprivations of property. (Brooks v. Small Claims Court (1973) 8 Cal.3d 661, 666-667 [105 Cal.Rptr. 785, 504 P.2d 1249], citing California and federal cases). (10) Viewed from a practical standpoint, the Council's act in consenting to L&M's condemnation did not deprive Ferreira and Milgen, even temporarily, of any interest in their property. The final deprivation resulted from the entry of the lower court's judgment of condemnation. Before that, no temporary deprivation occurred. Although L&M obtained an order for possession as mid-November 1979, Ferreira and Milgen challenged that order through their mandamus proceeding (see Assem. Legis. Com. com., 1975 add., 19 West's Ann. Code Civ. Proc., § 1255.410, pp. 705-706) and remained in possession until after L&M deposited the balance due them under the judgment of condemnation. Thus the practical effect of the Council's

act was simply to authorize L&M to commence a private condemnation action against Ferreira and Milgen. In that action L&M bore the burden of proving the propriety of its proposed taking. (See Lingii v. Garovotti, supra, 45 Cal.2d at p. 27; Recommendations Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., supra, at p. 1477; compare § 1245.250.) Ferreira and Milgen do not contend the lower court denied them a reasonable opportunity to be heard during the trial of L&M's condemnation action.

As noted above, the council treated its decision to consent as an adjudicative act, and even though there was no deprivation of property, procedural due process requirements applied. (Horn v. County of Ventura, supra, 24 Cal.3d at p. 612-613.) Ferreira and Milgen argue the Council denied them due process by not allowing them to discuss the blue easement #2 proposal at

the August 28 hearing. They concede they had a reasonable opportunity to be heard regarding the three alternatives considered on August 14.

There is an inherent tension in a hearing procedure such as the Council conducted between encouraging a full exploration of utility service alternatives and reaching a timely decision regarding whether to adopt a resolution of consent. The basic issues the decisionmaking agency (§ 1245.310) should address through such a procedure are whether to consent to a proposed taking and, if so, to determine the appropriate location for the taking. The Council considered both issues on August 14. Having received adequate notice of the August 14 hearing, and having previously negotiated with L&M regarding its proposed condemnation of a utility easement across their property, there was no reason for Ferreira and Milgen to present to the Council on August 14 anything less than a

comprehensive statement of their position. They did in fact contest both the necessity and appropriate location for L&M's proposed condemnation. Having spoken to the basic issues to be addressed, the fact Ferreira and Milgen later had another idea for a different location does not mean they had a due process right to another hearing. (See Dami v. Dept of Alcoholic Bev. Control (1959) 176 Cal.App.2d 144, 151 [1 Cal.Rptr 213].) To hold they had such a right would be to hold the requirement of a reasonable opportunity to be heard includes the right, in effect, to have the last word in a decision making agency's hearing procedure. Were that the law, decisions regarding whether to adopt resolutions of consent could be endlessly delayed by the inadvertent omissions or deliberate strategies of prospective condemnees. Due process cannot become a vehicle for bringing the process of government to a halt. (Ibid.) The Council's hearing procedure did not

violate Ferrera's and Milgen's due process rights.[5]

C

Validity of Council's Resolution

(11) An administrative decision which "substantially affects fundamental vested rights" (Bixby v. Pierno (1971) 4 Cal.3d 130, 144 [93 Cal.Rptr. 234, 481 P.2d 242]) invokes judicial review under the independent judgment rule of section 1094.5. Other adjudicative acts are subject to review under that section's substantial evidence test. (Strumsky v. San Diego County Employees Retirement Assn., supra, 11 Cal.3d at pp. 32, 44-45.)

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[5]Given Ferreira's and Milgen's constitutional rights to be heard were not violated, it followed their counterpart statutory rights (§ 1245.330, subd. (a)) also were not violated. (See Franchise Tax Board v. Superior Court (1950) 36 Cal.2d 330, 349 [225 P.2d 905].)

(12) We are satisfied Ferreira's and Milgen's interests in their property represented "fundamental vested rights." (See Underthiner v. Desert Hospital (1983) 33 Cal.3d 285, 294-296 [188 Cal.Rptr. 590, 656 P.2d 554]; Mountain Defense League v. Board of Supervisors, supra, 65 Cal.App.3d at pp. 728, 730.) The Council's act in consenting to L&M's condemnation, however, did not "substantially affect" those rights because, as explained above (see Part III B), it did not deprive Ferreira and Milgen of any interest in their property. (See ibid.; see also Bixby v. Pierno, supra, 4 Cal.3d at pp. 144-147.) Consequently, the substantial evidence test applies to our review of the Council's decision to consent.

(13) In applying the substantial evidence test ". . . a reviewing court . . . must scrutinize the record and determine whether substantial evidence supports the administrative agency's

findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision." (Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514 [113 Cal.Rptr. 836, 522 P.2d 12].) So long as they are sufficient to apprise a reviewing court of the basis for the agency's decision (id., at pp. 514, 517, fn. 16), the necessary findings may be formal or informal and may be contained in the agency's order or decision. (Hadley v. City of Ontario (1974) 43 Cal.App.3d 121, 128 [117 Cal.Rptr. 513].)

(14) The Council's findings appear in the text of its resolution of consent. We have reproduced that resolution in an appendix to this opinion, with paragraph numbers added in brackets for easy reference. The findings contained in the resolution satisfy all applicable statutory

requirements and thus support the Council's decision to consent. Paragraphs 6 through 9 generally describe the public uses to be served by L&M's easement (§§ 1240.010, 1245.340, subd. (a)), and paragraph 11 identifies the statutory authority for L&M's condemnation of that easement (§ 1245.340, subd. (a)). Paragraphs 1, 9, and 10, with accompanying exhibits, describe quite precisely the location and extent of the easement to be taken. (Civ. Code, § 1001, subd. (c)(1); § 1245.340, subd. (b).) Paragraphs 13 and 14 explain the great necessity for L&M's taking of the easement (§ 1245.325, subd. (b)(1)), while paragraph 15 justifies the location selected for the taking (Civ. Code § 1001, subd. (c)(2); § 1245.325, subd. (b)(2)). Finally, paragraph 16 presents the Council's assessment of the relative hardships the parties would bear if the taking was either disapproved or permitted (Civ. Code § 1001, subd. (c)(3); § 1245.325, subd. (b)(3).) The

pertinent evidence supporting these findings also appears in the Council's resolution. (See ¶¶ 2, 4-8, 13-16.) That evidence was presented to the Council by its staff and the parties at the hearings on August 14 and 28. Taken together with the other evidence presented to the Council at those hearings (see part I, ante), we conclude the Council's findings were supported by substantial evidence.

IV

RATE OF INTEREST

(15) In their final argument, Ferreira and Milgen contend the lower court violated their rights to "just compensation" under the Fifth and Fourteenth Amendments to the United States Constitution by applying the legal rather than market rate of interest to their $8,400 condemnation award. Authority exists for awarding interest at either rate. (Legal rate: Brown v. United

States (1923) 263 U.S. 78, 86-87 [68 L.Ed. 171, 182, 44 S.Ct. 92]; United States v. Baugh (5th Cir. 1945) 149 F.2d 190, 193; see also 3 Nichols on Eminent Domain (3d rev. ed. 1981) § 8.63[3] at pp. 8-360 to 8-362; market rate: United States v. 429.59 Acres of Land (9th Cir. 1980) 612 F.2d 459, 464, 465; United States v. Blankinship (9th Cir. 1976) 543 F.2d 1272, 1276-1277.) Ferreira and Milgen argue, in essence, they have not received an adequate return on their condemnation award. They do not challenge the adequacy of the award itself. In the particular circumstances of this case, we need not resolve the constitutional issue Ferreira and Milgen raise. In addition to seven percent legal interest, Ferreira and Milgen have received value from remaining in possession until after L&M deposited the balance due them under the judgment of condemnation. (See §

1268.330, subd.(a).)[6] Given their receipt of legal interest plus use of the property, Ferreira and Milgen cannot complain they have received an inadequate return on their condemnation award. As a practical matter, their return has been sufficient.

V

DISPOSITION

Judgments affirmed.

Cologne, Acting P.J., and Lewis, J.,* concurred.

APPENDIX

Resolution No. 9753

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CHULA VISTA CONSENTING TO THE

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[6] L&M has not cross appealed the interest awarded Ferreira and Milgen.

* Assigned by the Chairperson of the Judicial Council.

ACQUISITION OF AN APPURTENANT EASEMENT IN PROPERTY AT VILLA SAN MIGUEL BY MEANS OF EMINENT DOMAIN

The City Council of the City of Chula Vista does hereby resolve as follows:

[1] WHEREAS, L&M Professional Consultants, Inc., (hereinafter "L&M") is engaged in the development and construction of a residential subdivision in the City of Chula Vista, State of California, more commonly known as Villa San Miguel, Chula Vista Tract 79-15, and

[2] WHEREAS, there presently exists no sewer hookup capable of servicing said tract, and

[3] WHEREAS, the development and construction of said tract is in the public interest, and for the benefit of the City of Chula Vista, and

[4] WHEREAS, said tract cannot be developed for human habitation without the provision of adequate sanitation facilities, and

[5] WHEREAS, the public interest, and good sanitation and engineering practices make the use of septic systems or other alternatives to the connection of this tract with the sewer system of the City of Chula Vista at this location neither desirable nor feasible, and

[6] WHEREAS, the public interest, and good sanitation and engineering practices require that said tract obtain adequate access to the sewer system of the City of Chula Vista, and

[7] WHEREAS, the public interest required the provision of adequate drainage facilities to insure that runoff will not accumulate on adjacent parcels, but rather can be adequately channeled into the storm drains of the City of Chula Vista, and

[8] WHEREAS, the City has studied various alternatives for the provision of sewer and drainage for said property, and

[9] WHEREAS, the most feasible path for a sewer hookup and drainage is found to

run from the northerly corner of said project, in a generally northerly corner of said project, in a generally northerly direction to Bonita Glen Drive, as shown on the plat map attached hereto as Exhibit "A" and as further described in the attached legal description, Exhibit "B," and

[10] WHEREAS, said proposed easement traverses a portion of Lot 1, Sunny Vista Map No. 2207, which land is held in fee title, according to the latest equalized assessment role, by Mr. Frank Ferreira and Milgen Investment Company, and

[11] WHEREAS, L&M possesses the right to acquire said easement by the use of the power of eminent domain, pursuant to Civil [sic] Code Section 1001 and Sections 1245.310, et seq. of the Code of Civil Procedure, provided that the City of Chula Vista consent to said acquisition as required by Sections 1245.330, 1245.340, 1245.350 and 1245.360 of the Code of Civil Procedure, and

[12] WHEREAS, L&M has requested the City of Chula Vista to authorize the commencement of proceedings in the [sic] eminent domain for the acquisition of said easement, and

[13] WHEREAS, there is a great necessity for the acquisition of said easement in that without the acquisition of said easement Villa San Miguel will lack connection to the sewer system of the City of Chula Vista, creating a public health and sanitation hazard and rendering completion of said tract for the use and enjoyment of the citizens of the City of Chula Vista impossible, and

[14] WHEREAS, there is also a great necessity for the taking of said easement in that the drainage portion of said easement is necessary for the protection of adjacent landowners from erosion, runoff, flooding, inundation, and attendant sanitation problems, and

[15] WHEREAS, the configuration and location of said easement as shown on Exhibits "A" and "B" affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property because said easement is located in such a fashion to correspond with the proposed alignment of the driveway to be used for the development of the subject property by the owner and, therefore, will provide easy access for maintenance and will have the least interference with the use of the property and can be developed in such a manner so as to assure adequate flowage and proper hydraulic entry to the sewer and storm drain systems of the City of Chula Vista will, therefore, achieve the necessary public purpose intended and constitute the most minimal and reasonable degree of interference with the use and enjoyment of the burdened property, and

[16] WHEREAS, the hardship to the owner of the appurtenant property, if the taking is not permitted, will be substantial, in that the investment in the development of Villa San Miguel will be seriously impaired or lost and the hardship to the owner of the burdened property is minimal, in that the easement is located in such a fashion as to minimize interference with the reasonable use and enjoyment of the burdened property and the hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property, and

[17] WHEREAS, the property described in the resolution is necessary for the proposed projects.

Now, Therefore, Be It Resolved that the City Council of the City of Chula Vista does hereby consent to the acquisition of the above-described easement by L & M by the institution of proceedings in eminent

domain and this resolution is intended to comply with Section 1245.330 of the Code of Civil Procedure.

[150 Cal.App.3d 1091]

[Civ. No. 68906. Second Dist., Div. One. Jan. 20, 1984.]

REDEVELOPMENT AGENCY OF THE CITY OF BURBANK,
Plaintiff and Respondent, v.
WALTER L. GILMORE, JR., et al.,
Defendants and Appellants.

SUMMARY

In condemnation proceedings involving the pretrial taking of two parcels of property, the property owners moved that interest for the delay in payment of compensation be awarded at 16.3 percent from the effective date of the orders for possession to the date of payment. The trial court, however, awarded the owners of one parcel interest at the legal rate, and owners of another parcel interest at the rate of 7 percent. The owners appealed. (Superior Court of Los Angeles County, Nos. C345175, Earl F. Riley and Campbell M. Lucas, Judges.)

The Court of Appeal reversed the judgments as to the interest rate awards and remanded for a determination of the weighted average market rate of interest during the pertinent time period, and otherwise affirmed. The court held that where there has been a pretrial taking of private property, interest on the unpaid value of the property must be paid at the prevailing market rate in order to provide just compensation in accordance with U.S. Const., 5th Amend., prohibiting taking private property for public use without just compensation, and that the determination of the rate of interest necessary to provide just compensation is a question for the trial court, and not a matter subject to preordination by legislative fiat. The court further held that, because of the federal constitutional right to just compensation, the trial court had a duty to determine from the evidence that the legal rate of interest in California established

by Cal. Const., art. XV, §1,and Code Civ. Proc., § 1268.320, would not place the owners in as good a position pecuniarily as they would have been if their property had not been taken. (Opinion by Dalsimer, J., with Lillie, Acting P. J., and Hanson (Thaxton), J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Eminent Domain § 42 - Compensation - Measure and Elements of Damages - Interest - Market Rate - Constitutional Requirements. -- Where there has been a pretrial taking of private property, interest on the unpaid value of the property must be paid at the prevailing market rate in order to provide just compensation in accordance with U.S. Const., 5th Amend., prohibiting taking private property

for public use without just compensation. Accordingly, in a condemnation action, the trial court had a duty to determine from the evidence that the legal rate of interest in California established by Cal. Const., art. XV, § 1, and by Code Civ. Proc., § 1268.320, limiting interest to 10 percent, would not place the owners in as good a position pecuniarily as they would have been in if their property had not been taken, where unrebutted evidence indicated that neither the 7 percent rate of interest provided by Cal. Const., art. XV, § 1, nor the 10 percent statutory rate of interest was sufficient to provide just compensation to the property owners.

[See Cal.Jur.3d, Eminent Domain, § 132; Am.Jur.2d, Eminent Domain, § 302.]

(2) Eminent Domain § 42 - Compensation - Measure and Elements of Damages - Interest Limitation to Legal Rate - Constitutionality. -- The California Constitution's limitation of interest (art. XV, § 1) to not more than 10 percent, and the implementing statute (Code Civ.Proc., § 1268.320) conflict with the federal constitutional requirements (U.S. Const., 5th Amend.) of payment of just compensation for the taking of private property for a public purpose as applied to interest payable to a condemnee for delay in the payment of the value of the property taken before trial. As the just compensation right has its source in the federal Constitution, that right supersedes state constitutional and statutory limitations of interest in the context of eminent domain. Thus, the determination of prejudgment and postjudgment interest is a

question for the trial court, and not a matter subject to preordination by legislative fiat.

(3) Eminent Domain § 42 - Compensation - Measure and Elements of Damages - Interest - Market Rate - Determination Period. -- In determining the market rate of interest payable to a condemnee for delay in the payment of the property taken before trial, the rate at which the condemnee borrowed money to purchase new property was relevant but not determinative. Evidence of interest rates in general during the pertinent period had more bearing on the issue of the proper rate than did the condemnee's isolated transaction. Prevailing interest rates charged for the financing of real property during the period in question was the rate of interest needed to provide just compensation.

(4) Eminent Domain § 121 - Condemnation Proceedings - Cost and Expenses - Litigation Expenses - Offer and Award. -- Under Code Civ. Proc., § 1250.410, subd. (b), governing a condemnee's recovery of litigation expenses, the mathematical relation between the condemnor's highest offer and the award is but one factor to be considered by the trial court. The statute requires the court to evaluate the reasonableness of the condemnor's offer in light of the award and the evidence adduced at trial. Their determination of that issue is a resolution of a question of fact and will not be disturbed on appeal if supported by substantial evidence. Where no reporter's transcript of the trial has been provided, it must be presumed that the evidence adduced at trial supports the determination that the offer was reasonable in view of

the trial court's denial of a motion for litigation expenses.

COUNSEL

Irsfeld, Irsfeld & Younger, O'Neill & Huxtable and Richard L. Huxtable for Defendants and Appellants.

William B. Rudell, City Attorney, and Richard W. Marston, Senior Assistant City Attorney, for Plaintiff and Respondent.

OPINION

DALSIMER, J. - This case presents the question whether interest payable to a condemnee for delay in the payment of the value of property taken before trial should be awarded at the legal rate or at the prevailing market rate.

Defendants Walter L. Gilmore, Jr., Pamela A. Gilmore, George W. Strattan, Howard L. Hudson, and Frances P. Hudson

appeal from the respective judgments entered against them in this eminent domain action. Howard and Frances Hudson also appeal from the order denying their motion to recover litigation expenses and the order granting plaintiff's motion to tax costs.

On November 13, 1980, plaintiff filed its complaint seeking condemnation of a parcel of real property owned by George Strattan and the Gilmores (parcel 9) and a separate parcel of real property owned by the Hudsons (parcel 10). On December 9, 1980, upon plaintiff's deposit of $200,000 with the court clerk, an order was entered authorizing plaintiff to take possession of parcel 9. On that same date, upon plaintiff's deposit of $160,000 with the court clerk, an order was entered authorizing plaintiff to take possession of parcel 11. Each order for possession became effective 90 days after service of the order. The values of the respective parcels were

thereafter determined at trial.

Strattan and the Gilmores introduced evidence that from March 1981 to April 1982 the "National Average Mortgage Contract Rate for Major Lenders" on the purchase of previously occupied homes varied from 13.91 percent to 15.80 percent, and that after March 1981, interest rates being paid on intermediate-term certificates of deposit by various banks and savings and loans ranged from 13.5 percent to in excess of 15 percent. Mr. Gilmore's declaration stated that, in purchasing property comparable to parcel 9 on February 10, 1981, the Gilmores made a down payment of $200,000 and borrowed $225,000 at 14 percent interest to pay the balance of the purchase price.[1]

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[1]The declaration incorporated by reference facts set forth in the "Notice of Intention to Call Defendant, Walter L. Gilmore, Jr., as a Valuation Witness," which was filed July 29, 1981. Because the latter document was listed in appellants' (Footnote Continued)

The Hudsons introduced a summary of information obtained from the Federal Reserve Bulletin concerning prevailing interest rates in 1981 and January 1982 for long-term bond rates for government and utility bonds as well as conventional mortgage rates. The publication showed that in 1981 the average long-term government bond interest rates ranged from 9.97 to 15.13 percent and that in January 1982 the average interest rate for long-term state and local government bonds was 12.97 percent. It also indicated that in 1981 average interest rates on conventional mortgages ranged from 15.10 percent to 18.05 percent and that in January 1982 the average interest rate for a conventional mortgage was 17.20 percent.

(Footnote Continued)
designation of clerk's transcript but is not part of the clerk's transcript, we have reviewed that document upon obtaining the superior court file. (Cal. Rules of Court, rule 12(a).)

The Hudsons also introduced the publication's summary of prime rates charged by banks on short-term business loans and interest rates on the money and capital markets on state and local notes and bonds rated Aaa by Moody's Investors Service. The summary indicated that the average prime rate ranged from 15.75 percent to 20.50 percent in 1981, and that it was 15.75 percent in January 1982 and 16.65 percent in February 1982. The publication also showed that the average interest rate for the money and capital markets on state and local notes and bonds rated Aaa was 10.43 percent in 1981 and ranged from 12.20 percent to 12.30 percent in January and February of 1982. The declaration of Richard Huxtable, attorney for the Hudsons, stated that Mr. Huxtable had personal knowledge that during this period of time conventional purchase money note deeds of trust required interest rates at or above 14 percent per annum.

No evidence was introduced by plaintiff concerning the prevailing interest rates. Based on this state of the record, appellants moved that interest for the delay in payment of compensation be awarded at 16.3 percent per annum from the effective date of the orders for possession to the date of payment.

On June 30, 1982, an interlocutory judgment was entered as to parcel 11, fixing the value of the property at $284,000. Because of the deposit of $160,000, $124,000 was awarded to the Hudsons with "interest at the legal rate" from March 18, 1981, to the date of payment.

On July 21, 1982, an interlocutory judgment was entered as to parcel 9, reciting that the value of the property was $500,000 and that $326,590 had already been paid to Strattan and the Gilmores. The judgment awarded Strattan and the Gilmores $173,257 and awarded the County of Los

Angeles $153 for real property taxes. Strattan and the Gilmores were awarded interest on the sum of $300,000 at the rate of 7 percent per annum from March 16, 1981, to February 16, 1982, and interest on the sum of $173,410 at 7 percent per annum from February 16, 1982, to the date of payment.

I

(1a) We hold that, where there has been a pretrial taking of private property, interest on the unpaid value of the property must be paid at the prevailing market rate in order to provide just compensation in accordance with the Fifth Amendment of the United States Constitution.

In Seaboard Air Line R. Co. v. United States (1923) 261 U.S. 299 [67 L.Ed. 664, 43 S.Ct. 354], the United States Supreme Court explained the Fifth Amendment prohibition against taking private property for public use without just compensation,

stating: "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. [Citation.] It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. [Citation.]" (Id., at p. 304 [67 L.Ed. at p. 669].)[2] It therefore follows that, where the fair market value of the property has not been paid contemporaneously with the taking, the owner is entitled to interest for delay in payment from the date of the taking until the date of payment. (Miller v. United States (Ct.Cl. 1980) 620 F.2d 812, 837; see Albrecht v. United States (1947) 329 U.S.

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[2]The Fifth Amendment just compensation clause was held applicable to the states through the due process clause of the Fourteenth Amendment in Chicago, B. & Q. R. Co. v. Chicago (1897) 166 U.S. 226, 241 [41 L.Ed. 979, 986, 17 S.Ct. 581].

599, 602 [91 L.Ed. 532, 537-538, 67 S.Ct. 606]; Seaboard Air Line R. Co. v. United States, supra, 261 U.S. 299, 306 [67 L.Ed. 664, 669-670].) Payment of such interest at the prevailing rate is necessary to achieve the federal constitutional mandate that the property owner be provided just compensation. (Miller v. United States, supra, 620 F.2d. 812, 837-839.)

Our Legislature has provided for interest on condemnation awards by Code of Civil Procedure sections 1268.310 and 1268.320.[3] Section 1268.310 provides, "The compensation awarded in the proceeding shall draw legal interest from the earliest of the following dates: [¶] (a) The date of entry of judgment. [¶] (b) The date the plaintiff takes possession of the property. [¶] (c) The date after which the plaintiff

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[3]All California statutory references hereinafter are to the Code of Civil Procedure.

is authorized to take possession of the property as stated in an order for possession." Section 1268.320 provides, "The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates: [¶] (a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 (deposit of probable compensation prior to judgment), the date such amount is withdrawn by the person entitled thereto. [¶] (b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110) (deposit of amount of award), the date of such deposit. [¶] (c) As to any amount paid to the person entitled thereto, the date of such payment."

The legal rate of postjudgment interest was 7 percent until July 1, 1983 (Cal. Const., art. XV, § 1), and thereafter was set by section 685.010 at 10 percent. Article XV, section 1, of the California Constitution provides in pertinent part,

"The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both. [¶] In the absence of the setting of such rate by the legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum. [¶] The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith." [4] Section 685.010, which became operative July 1, 1983, provides in pertinent part as follows: "Interest accrues at the rate of

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[4]Because of this final sentence in article XV, section 1, of the California Constitution, our discussion of the right of just compensation is based on the federal constitutional right and not on California Constitution, article I, section 19.

10 percent per annum on the principal amount of a money judgment remaining unsatisfied." Section 685.110 provides, "Nothing in this chapter affects the law relating to prejudgment interest."

Defendants' evidence shows, and indeed judicial notice reveals, that in recent years market rates of interest have greatly exceeded 7 percent and have also exceeded the new statutory rate of 10 percent. (2) Thus, we are confronted with the issue whether the California Constitution's limitation of interest conflicts with the federal constitution requirement of payment of just compensation for the taking of private property for a public purpose. As the just compensation right has its source in the federal constitution, that right supersedes state constitutional and statutory limitations of interest in the context of eminent domain. We hold that the determination of the rate of prejudgment and postjudgment interest necessary to

provide just compensation is a question for the trial court. (See § 1268.340.) It is a matter not subject to preordination by legislative fiat. A governmental entity desiring to avail itself of the sovereign right to pretrial possession should not be permitted also to make use of the property owner's just monetary award at bargain interest rates.

We do not here tread on virgin judicial soil. Numerous courts have recognized that the determination whether a particular rate of interest is sufficient to provide just compensation is a judicial function and that the rate of interest provided by statute may apply only if it is adequate under federal constitutional requirements. (See Seaboard Air Line R. Co. v. United States, supra, 261 U.S. 299, 306 [67 L.Ed. 664, 669-670]; Miller v. United States, supra, 620 F.2d 812, 837-838; United States v. 429.59 Acres of Land (9th Cir. 1980) 612 F.2d 459, 464-465; United States v.

Blankinship (9th Cir. 1976) 543 F.2d 1272, 1275-1276; Textron, Inc. v. Commissioner of Transp. (1978) 176 Conn. 264 [407 A.2d 946]; Department of Transp., etc. v. Rasmussen (1982) 108 Ill.App.3d 615 [64 Ill.Dec. 119, 439 N.E.2d 48]; Marine Midland Bank, N.A. v. State (1983) 118 Misc.2d 472 [460 N.Y.S.2d 902]; Township of Wayne in County of Passaic v. Cassatly (1975) 137 N.J.Super. 464 [349 A.2d 545]; State by Spannaus v. Carney (Minn. 1981) 309 N.W.2d 775.)

Payment of prejudgment or postjudgment interest at a rate far below what the condemnee could reasonably have expected to earn had the award been contemporaneous with the taking simply does not accord with the federal constitutional requirement of just compensation. In 1940, the California Supreme Court stated that legal interest was "frequently accepted as the basis for fixing the measure of damages" caused by delay in compensating the owner for a

taking. (Metropolitan Water Dist. v. Adams (1940) 16 Cal.2d 676, 681 [107 P.2d 618].) We infer from the court's statement that the legal rate of interest was "frequently accepted" for such purpose that such rate of interest might not always be sufficient to provide just compensation. Recently, in United States v. Blankinship supra, 543 F.2d 1272, the Ninth Circuit Court of Appeals construed the 6 percent interest rate (40 U.S.C. § 258a) specified by the Declaration of Taking Act (40 U.S.C. § 258a et seq.) as the minimum rather than the maximum rate of interest applicable to delay damages, noting that "a rate no greater than 6 percent in some instances will contravene the Fifth Amendment." (United States v. Blankinship supra, 543 F.2d 1272, 1276.) The court held that the market rate of interest for the period of delay should be used, and it provided guidelines for determination of that rate. (Id. at pp. 1276-1277.) In Matter of City

of New York (1983) 58 N.Y.2d 532 [462 N.Y.S.2d 619, 449 N.E.2d 399], the New York Court of Appeals held that the 6 percent statutory rate of interest was inadequate to provide just compensation for the years 1978-1981 because the average interest rates on stable investments during that period ranged from 8.3 percent in 1978 to 12.5 percent in 1981. (Also see Department of Transp., etc. v. Rasmussen supra, 108 Ill.App.3d 615 [64 Ill.Dec. 119, 439 N.E.2d 48]; [6 percent rate of interest "'grossly inadequate'"]; Miller v. United States supra, 620 F.2d 812, 838 [6 percent rate of interest "neither reasonable nor judicially acceptable"].)

In L&M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038 [194 Cal.Rptr. 695], the court noted but found it unnecessary to reach the question whether application of the legal rather than market rate of interest may violate the Fifth Amendment right to just

compensation. (Id., at p. 1057.) The court stated that Brown v. United States (1923) 263 U.S. 78, 86-87 [68 L.Ed. 171, 182, 44 S.Ct. 92], is authority for awarding interest at the legal rate. (L&M Professional Consultants, supra, 146 Cal.App.3d at p. 1057.) We do not so read the Brown case. Rather, we read Brown as holding that, to comply with the conformity provision of the federal Act of August 1, 1888, (Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357),[5] a federal court should follow such a state provision "if it a fair one." (Brown, supra, 263 U.S. at p. 87 [68

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[5]The conformity provision read, "The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding." (Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357.)

L.Ed. at p. 182].) A corollary is implied that, if it is not fair, such a state provision should not apply.

(1b) Because the Fifth Amendment right to just compensation is a federal constitutional right, the trial court had a duty to determine from the evidence that the legal rate of interest in California established by the California Constitution and by Code of Civil Procedure section 1268.320 would not place the owners in "as good [a] position pecuniarily as [they] would have been [in] if [their] property had not been taken." (Seaboard Air Line R. Co. v. United States, supra, 261 U.S. 299, 304 [67 L.Ed. 664, 669].)

Unrebutted evidence indicated that neither the 7 percent rate of interest provided by California Constitution, Article XV, section 1, nor the 10 percent statutory rate of interest effective July 1, 1983, was sufficient to provide just compensation to defendants.

(3) The Gilmores' contention that they should be awarded interest at the same rate at which they were required to borrow money cannot be sustained. Although the rate at which the Gilmores borrowed is relevant, that rate alone is not determinative. (Georgia-Pacific Corp. v. United States (Ct.Cl. 1980) 640 F.2d 328, 366.) Evidence of interest rates in general during the pertinent period has more bearing on the issue of the proper rate than does the Gilmores' isolated transaction. Prevailing interest rates charged for the financing of real property during the period in question are particularly relevant to determination of the rate of interest needed to provide just compensation. Also relevant to such determination are loan origination fees that would be required to obtain interim financing because of the discrepancy between the amount of the deposited funds and the ultimate award.

(4) Howard and Frances Hudson filed a memorandum of costs and disbursements listing attorney's fees and appraisal fees as recoverable items. They also moved for recovery of those items as litigation expenses pursuant to section 1250.410, subdivision (b). Their motion was opposed by plaintiff, and plaintiff also moved for an order striking those items from the Hudsons' memorandum of costs and disbursements. The trial court denied the motion for litigation expenses and granted the motion to tax costs.

The Hudsons contend that those rulings were erroneous because the award was significantly higher than the highest offer made by plaintiff. The Hudsons rely on County of Los Angeles v. Kranz (1977) 65 Cal.App.3d 656 [135 Cal.Rptr. 473] and Community Redevelopment Agency v. Friedman (1977) 76 Cal.App.3d 188 [143 Cal.Rptr.

160] in support of this contention. When the motions under review in Kranz and Friedman were ruled upon, recovery of a condemnee's litigation expenses was governed by former section 1249.3, which provided in pertinent part: "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of the condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including, and not limited to, reasonable attorney's fees [and] appraisal fees . . . " (Stats. 1974, ch. 1469, § 1, p. 3208, italics added.) Former section 1249.3 has been replaced by section 1250.410. When the motions to tax costs and to recover litigation expenses

were made in the instant case, subdivision (b) of section 1250.410 provided as follows: "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written, revised or superseded offers and demands served and filed prior to or during trial." (Italics added.)[6] (Sec. 1235.140 defines

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[6]Section 1250.410, subdivision (b), now provides: "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable
(Footnote Continued)

"litigation expenses" as including attorney's fees and appraisal fees reasonably and necessarily incurred by the defendants.)

Thus, the mathematical relation between the plaintiff's highest offer and the award is but one factor to be considered by the trial court. Section 1250.410 requires the court to evaluate the reasonableness of the plaintiff's offer in light of the award and the evidence adduced at trial. The trial court's determination of that issue is a resolution of a question of fact and will not be disturbed on appeal

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(Footnote Continued)
viewed in light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include in the defendant's litigation expenses. [¶] In so determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during trial."

if supported by substantial evidence. (City of El Monte v. Ramirez (1982) 128 Cal.App.3d 1005, 1009-1014 [180 Cal.Rptr. 690].)

Although appellants have supplied us with a reporter's transcript of the hearing on the motion for recovery of litigation expenses and to tax costs, the Hudsons have neglected to supply this court with a reporter's transcript of the trial. Since the reporter's transcript of the trial has not been provided, we must presume that the evidence adduced at trial supports the determination that plaintiff's offer was reasonable. (Ibid.)

That portion of the judgment involving parcel 11 that awards the Hudsons interest at the legal rate is reversed and remanded for a determination of the weighted average market rate of interest during the time period mentioned in that judgment. The judgment involving parcel 11 is otherwise affirmed. That portion of the judgment

involving parcel 9 that awards the Gilmores and Strattan interest at 7 percent is reversed and remanded for a determination of the weighted average market rate of interest during the period of time mentioned in that judgment. The judgment involving parcel 9 is otherwise affirmed. The order denying the Hudsons' motion to recover litigation expenses is affirmed.

Lillie, Acting P.J., and Hanson (Thaxton), J., concurred.

PROOF OF SERVICE

I, Michael B. Poynor, of the law firm of Sternberg, Eggers, Kidder & Fox, was duly admitted to practice before the Supreme Court in the State of California on January 5, 1972, and before the United States Supreme Court on June 23, 1975. My firm address is 2020 Central Savings Tower, 225 Broadway, San Diego, California 92101. On March 22, 1984, within the permitted time I served copies of the APPENDIX TO PETITION FOR WRIT OF CERTIORARI addressed as follows below.

Office of the Clerk United States Supreme Court Washington, D.C. 20543	Original plus 40 Copies
Supreme Court of the State of California 3850 Wilshire Boulevard Los Angeles, CA 90010	3 Copies
Court of Appeal Fourth Appellate District Division One 6010 State Building 1350 Front Street San Diego, CA 92101	3 Copies
Superior Court Appeals Department 220 West Broadway, 3rd Floor San Diego, CA 92101	3 Copies
John K. Van de Kamp California State Attorney General 1550 "K" Street, Suite 511 Sacramento, CA 95814	3 Copies

Richard A. Paul, Esq. 3 Copies
Gray, Cary, Ames & Frye
2100 Union Bank Building
San Diego, CA 92101

Thomas J. Harron, Esq. 3 Copies
Chula Vista City Attorney
276 Fourth Avenue
Chula Vista, CA 92010

The above parties were served by placing the necessary copies in an envelope, first-class postage prepaid and mailed by deposit in a United States mailbox at San Diego, California.

I declare under penalty of perjury that the foregoing is true and correct, and that this Proof of Service was executed on March 22, 1984.

Michael B. Poynor

STATE OF CALIFORNIA)
) SS
COUNTY OF SAN DIEGO)

On March 22, 1984, before me, the undersigned, a Notary Public in and for said State, personally appeared Michael B. Poynor, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.